73-106

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-106

ALDEN G. HANSEN,

Petitioner,

vs.

UNITED CALIFORNIA BANK,

Respondent.

In the Matter of ALDEN G. HANSEN,

Bankrupt.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Judicial Circuit.

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ALDEN G. HANSEN,

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vs.

UNITED CALIFORNIA BANK,

Respondent.

In the Matter of ALDEN G. HANSEN,

Bankrupt.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Judicial Circuit.

Petitioner, Alden G. Hansen, in accordance with Rule 23 of the United States Supreme Court, hereby petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Judicial Circuit from the judgment entered in the proceedings on February 28, 1973, affirming the judgment and order of the District Court and Referee in Bankruptcy below, and from that Order of April 16, 1973, denying the Petition for Reconsideration and/or Rehearing.

Opinions Below.

The Findings of Fact, Conclusions of Law and Order of the Honorable Ray H. Kinnison, Referee in Bankruptcy, which are not reported, appear at Appendix

A, *infra*, pages 1 to 7. The Order of the District Court, is unreported and appears at Appendix B, *infra*, page 8. The opinion of the Ninth Circuit Court of Appeals affirming the Orders of both lower courts is also not published and appears at Appendix C, page 9. The Order of the Ninth Circuit Court of Appeals denying the Petition for Reconsideration and/or Rehearing is not reported, and appears at Appendix D, page 10.

Jurisdiction.

The judgment of the Ninth Circuit Court of Appeals affirming the Order of the District Court which affirmed the Order of the Referee in Bankruptcy was entered on February 28, 1973. The Order of said Honorable Court denying the Petition for Reconsideration and/or Rehearing was entered on April 16, 1973. This Petition for Certiorari was filed less than ninety (90) days from the Order denying the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Section 24(c) of the Bankruptcy Act (11 U.S.C. Section 47(c)).

Questions Presented.

I.

Should a simple breach of contract be deemed a willful and malicious conversion and thus a nondischargeable debt; and since all debts are nothing more than broken promises, should all debts be nondischargeable?

II.

Assuming *arguendo* the existence of an act of conversion, are all such acts necessarily willful and malicious so as to be nondischargeable in bankruptcy?

Statutory Provision Involved.

"(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (2) Are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another. . . ." Bankruptcy Act, Section 17(a)(2) (11 U.S.C. Section 35(a)(2)).

Statement of Facts.

Petitioner, Alden G. Hansen, was the President and sole shareholder of Hibbs Precision Sheet Metal, Inc., (hereinafter referred to as "Hibbs"), a California corporation. On or about February 7, 1969, Hibbs and Respondent, United California Bank, a California banking corporation, entered into an accounts receivable financing arrangement whereby Hibbs was to be advanced not less than 80 percent of the face value of its accounts receivable. Respondent United California Bank was given a security interest in the proceeds of all accounts receivable, and Hibbs was required to remit the same. Concurrently therewith, Petitioner Hansen executed a continuing guarantee of all obligations due Respondent United California Bank from Hibbs.

During the period of January through July of 1970, Hibbs suffered financial difficulties and became obli-

gated for withholding and payroll taxes to various state and federal taxing agencies. On or about July 1, 1970, Respondent United California Bank notified Hibbs that the contractual relationship pertaining to the accounts receivable financing was terminated and that no additional advances would be made as against approximately $20,000.00 worth of accounts receivable, which were to be presented to Respondent United California Bank on or about that date. Hibbs was told to find other arrangements for obtaining monies on accounts receivable on or after July 1, 1970.

On or about July, 1970, Hibbs became unable to meet its current trade obligations, and Petitioner Hansen in his executive capacity as President of Hibbs, sought the advice of an attorney. Sylvan Y. Allen was thereafter retained as counsel for said corporation.

Petitioner informed Allen of the accounts receivable agreement and of the current financial condition of the corporation. Allen advised Petitioner Hansen that he had two conflicting duties: (1) The duty to the corporation to see that the corporation did not breach the agreement with Respondent United California Bank and (2) the primary duty to the corporation and to its creditors to attempt to preserve the corporation. Allen further informed Hansen that in the event of a conflict between these two duties, then the primary duty to preserve the corporation should take precedence.

On or about July 10, 1970, Hibbs received from various account debtors proceeds of accounts receiv-

able. On July 10, 1970, Petitioner Hansen, acting in good faith upon the advice of his counsel (Sylvan Y. Allen) that such procedure would ensure that the priority claims, some attorney's fees, and other necessary expenses could be paid, and to protect against attaching creditors and various types of levies, caused checks in the total sum of $26,950.94 derived from the accounts receivable of Hibbs to be deposited to a trust account at the Bank of California, held in the name of Sylvan Y. Allen, as Trustee for Hibbs. Shortly thereafter (July 15, 1970), a letter was issued by Allen to corporate creditors calling for a meeting of corporate creditors, at which meeting demands were made upon Hibbs and upon Petitioner Allen for the turnover of the accounts receivable proceeds.

During the period of July 10, 1970, through August 15, 1970, checks were drawn on the trust account and used for payment of various creditor obligations of Hibbs, including rent, payroll, attorney's fees and other purposes. On or about July 23, 1970, the balance in the trust account was withdrawn and retained in the possession of Petitioner Hansen until September or October, 1970, at which time said funds were deposited in the Hibbs' accounts at the Sepulveda branch of the Bank of America and ultimately disbursed for payroll obligations.

At the time of the initial transaction and the establishment of a trust account for the deposit of the accounts receivable proceeds, Petitioner Hansen believed

that Respondent United California Bank was adequately secured from the other accounts receivable that had been assigned to it. Subsequent to the closing of the trust accounts and disbursement of the funds contained therein, Petitioner Hansen assisted Respondent United California Bank in the collection of other accounts receivable.

Subsequently, on April 7, 1971, Petitioner filed his voluntary Petition in Bankruptcy in the United States District Court, Central District of California, which Court had jurisdiction pursuant to Section 2(a) of the Bankruptcy Act (11 U.S.C. Section 11(a)). Petitioner was adjudicated a bankrupt on the same day and on July 15, 1971, duly received a discharge of all his debts, not excepted from discharge by Section 17 of the National Bankruptcy Act (11 U.S.C. Section 35).

In the interim, on May 19, 1971, the Respondent United California Bank filed its application to determine the dischargeability of the debt arising from the above-mentioned circumstances, alleging that said debt was based upon the willful and malicious conversion of funds by the Petitioner. Hearing on said application was had on August 5, 1971, before the Honorable Ray H. Kinnison, Referee in Bankruptcy, at which time said Referee gave Respondent judgment against Petitioner Hansen in the sum of $26,950.94 and determined that said debt was not dischargeable in bankruptcy. Subsequently, on August 30, 1971, present counsel was substituted for previous counsel, Sylvan Y. Allen, as attorney for Petitioner Hansen.

A Petition for Review of the Referee's Order was filed in the District Court on October 15, 1971, with the Referee's Certificate on Petition for Review of Referee's Order being subsequently filed on November 5, 1971. On February 24, 1972, the Petition was heard before the Honorable Harry C. Westover, United States District Court Judge, and an Order of the District Court made and entered on March 6, 1972, affirming the Referee's Order of August 19, 1971.

Petitioner Hansen, through his present counsel, filed a notice of appeal on March 16, 1972. On Feburary 28, 1973, an Order of the United States Court of Appeals for the Ninth Judicial Circuit was entered affirming the Order of the District Court which affirmed the Order of the Referee. Petitioner subsequently filed a Petition for Reconsideration and/or Rehearing, which Petition was denied by the Ninth Circuit Court of Appeals on April 16, 1973.

ARGUMENT.

I.

The Opinions Below Frustrate the Basic Purpose of the National Bankruptcy Act by Treating a Simple Breach of Contract as a Willful and Malicious Conversion, Thus Resulting in a Nondischargeable Debt in Bankruptcy.

All of the opinions below as expressed by the Honorable Referee in Bankruptcy and affirmed by the United States District Court for the Central District of California and the Ninth Circuit Court of Appeals have the effect of transforming a debt arising out of a breach of contract action inexplicably into an act of willful and malicious conversion, thus resulting in a nondischargeable debt in bankruptcy and thus also frustrating the basic purpose of the National Bankruptcy Act. Such a decision is in direct contravention to the previous rulings of this Honorable Court in expressing the purpose of the Bankruptcy Act. This Honorable Court, in *Williams v. United States Fidelity & Guaranty Company,* 236 U.S. 549, 59 L.Ed. 713, 35 S.Ct. 289 (1914), very clearly enunciated the intent behind the National Bankruptcy Act when it stated:

> "It is the purpose of the Bankruptcy Act. . . to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." (59 L.Ed. at 716).

To the same effect, see *Wright v. Union Central Life Insurance Company,* 304 U.S. 502, 82 L.Ed. 1490, 1499, 58 S.Ct. 1025 (1937).

The debt owing by Petitioner Hansen to Respondent United California Bank arose out of the breach of the financing agreement entered into by and between Hibbs and Respondent and guaranteed by Petitioner. However, the courts below have transformed this breach of contract into an alleged willful and malicious act of conversion, the debt for which has been said to be nondischargeable in bankruptcy. This Honorable Court was faced with a very similar problem in *Davis v. Aetna Acceptance Company,* 293 U.S. 328, 79 L.Ed. 393, 55 S.Ct. 151 (1934). In that case, the bankrupt was a car dealer who purchased an automobile by securing a loan from the creditor and giving the creditor a chattel mortgage covering the automobile purchased, securing the note evidencing the loan. The bankrupt further agreed to hold the automobile purchased as the property of the creditor and not to sell, pledge, or otherwise dispose of it except upon consent of the creditor in writing. However, in breach of the aforementioned agreement, the bankrupt sold the car without the permission of the creditor and never remitted payment even though he had promised to do so. The court recognized the events above to constitute a breach of contract, and rejected the claim that this was a willful and malicious act of conversion. The creditor next claimed that the debt was nondischargeable under Section 17(a)(4) of the Bankruptcy Act (11 U.S.C. Section 35(a)(4)) on the grounds that this was a debt created by the fraud and misappropriation of the car dealer while acting in a fiduciary capacity. However, this Honorable Court responded that it would not find a fiduciary capacity where a normal contract existed and stated that the statute referred to express trusts and not those which the law implied from contracts.

Just as this Court would not imply a breach of fiduciary relationship where in reality a breach of contract occurred, neither should it allow a willful and malicious conversion to be implied from a very similar factual situation resulting in a breach of contract. Although a technical conversion may be implied and may have resulted from the breach of contract, just as a technical breach of fiduciary duty might have been implied from the breach of contract in *Davis*, it should not be such to constitute a willful and malicious conversion as referred to in Section 17(a)(2) of the Bankruptcy Act so as to result in a nondischargeable debt. Such an interpretation, as has evidently been forwarded by the courts below, is a technical interpretation of the statutes, which frustrates the strong intent of the Bankruptcy Act and directly contravenes the purpose of said act as clearly set forth by this Honorable Court.

As was pointed out by this Court in *Royal Indemnity v. American Bond & Mortgage Company*, 289 U.S. 165, 77 L.Ed. 1100, 53 S.Ct. 551 (1932), it is the duty of the Courts to "construe the language of the (Bankruptcy) Act so as to effectuate the evident purpose of the legislation. . . ." (77 L.Ed. at 1104). However, the courts, in their opinions below, have acted in direct contravention of the rules set forth in the abovementioned case, and have so narrowly and technically construed the language of Section 17(a)(2) of the Bankruptcy Act so as to effectively frustrate the purpose of the Bankruptcy Act.

II.

Even Assuming Arguendo the Existence of an Act of Conversion, All Acts of Conversion Are Not Necessarily Willful and Malicious Per Se, as Assumed by the Honorable Referee in Bankruptcy Below.

It is well settled that a conversion is not always *per se* a willful and malicious injury to the property of another. *Robertson v. Interstate Securities Company,* 435 F.2d 784, (8th Cir. 1971); *Larsen v. Beekmann,* 276 Cal.App.2d 185, 80 Cal.Rptr. 654 (1969). In *Robertson v. Interstate Securities Company, supra,* where although a magistrate found that the bankrupt had failed to turn over secured property as per an agreement under a chattel mortgage securing the loan, the Court stated that: ". . . this finding alone does not serve to exempt the act of conversion from a previous discharge in bankruptcy. It is well settled that an act of conversion without a 'willful and malicious' injury to the property is not sufficient to render the debt 'nondischargeable' under the Bankruptcy Act." (435 F.2d at 787). The rule enunciated above has been clearly approved and promulgated by this Honorable Court in *Davis v. Aetna Acceptance Company, supra,* wherein it was stated that "a willful and malicious injury does not follow as of course from very act of conversion . . ." (79 L.Ed. at 397).

It is extremely important to note that both willfulness *and* maliciousness are required before a debt for conversion will be determined to be nondischargeable. It is just as important to realize that a finding that an act

of conversion was intentional does not automatically necessitate a finding that it was malicious. As was stated by the Court in *Rees v. Jensen,* 170 F.2d 348 (9th Cir. 1948),

> "It is clear that merely because a conversion is intentional it is not ex proprio vigore to be clasified as willful and malicious within the meaning of the pertinent section of the Bankruptcy Act. There must also be a showing of the tort with aggravating features, which will warrant a deduction that the conversion in question transcends ordinary wrongdoing into a situation evincing a reckless disregard of the personal or property rights of others, and a willingness by the tortfeasor to inflict the injury complained of in the specific case." (178 F.2d at 350-51).

It was similarly pointed out by a California Court in *Royal Indemnity Company v. Sherman,* 124 Cal.App. 2d 512, 269 P.2d 123 (1954), that "the embezzlement described . . . although it implies willfulness it does not necessarily imply malice. And a conversion of property is not in all cases a malicious act. There was no evidence that defendants acted maliciously." (124 Cal.App.2d at 517).

However, as the following colloquy between the Court and trial counsel indicates, the Honorable Referee in Bankruptcy concluded that the elements of a willful and malicious injury to property were present solely because of what he deemed to be the existence of a conversion.

> "REFEREE: Mr. Allen, do you have anything?
> MR. ALLEN: No. I think the Court has probably expressed the thought for me, because I see no

duty on the part of Mr. Hansen personally to do those things. They had a contract with a corporation of which Mr. Hansen was an officer, and Mr. Hansen personally guaranteed these accounts to them. The obligation was fixed if it wasn't paid.

REFEREE: But these documents were signed by Mr. Hansen and he testified he was the sole owner of the corporation and that he was personally liable.

MR. ALLEN: That's right. He signed as a guarantor.

REFEREE: Yes.

MR. ALLEN: Mr. Hansen signed as guarantor.

REFEREE: So he is liable on this obligation, as well as the corporation.

MR. ALLEN: That's right. There is no question as to his liability on the obligation.

REFEREE: What about the conversion?

MR. ALLEN: There was no conversion if it was used for corporate purposes. Where is the conversion?

REFEREE: I don't agree with you there. These accounts had been assigned to the bank. I think the law is quite clear that the sale or disposition of property given as security without the permission of the security holder is a willful and malicious conversion. The Supreme Court in *McIntyre vs. Cavanaugh* started that line of cases back in 1960 (sic). Unless you can show me some authority to the contrary, it appears to me that this is a conversion.

MR. ALLEN: Well, I am not prepared at this time to give any citations of the law, but if the

> Court wants to give me time, I will be glad to see what I can find.
>
> REFEREE: I think you will be wasting your time, Mr. Allen, because I have put in a lot of time on my notebook in preparing for these cases under the new Section 17, and I have a list of eight different decisions here squarely in point. I will find that the debt is nondischargeable in the amount of $26,950.94." [Rep. Tr. pp. 113-115].

As the transcript indicates, the Referee in Bankruptcy concluded that a willful and malicious conversion had taken place only because there was a "sale or disposition of property given as security without the permission of the security holder."

This determination is in direct contravention of the ruling of this Honorable Court in *Davis v. Aetna Acceptance Company, supra,* where the bankrupt in that case had also disposed of property given as security without the consent of the security holder. The Honorable Referee below assumed the existence of malice once he had concluded that there was a conversion, and failed to take into consideration whether or not the element of malice was or need be present.

As was pointed out above, neither a breach of contract, a technical conversion, nor even an intentional act of conversion, necessarily imply the existence of malice. In referring to a debt sought to be discharged in bankruptcy proceedings, the Court in *In re Vena,* 46 F.2d 81, (D.C. Cir. 1930), stated that: "Malice extends to an evil design, a wicked notion against someone."

If the bankruptcy court had indeed made a determination as to the existence of malice, then it would have

to have taken into consideration the surrounding circumstances, including the fact that the Petitioner acted in good faith upon the advice of his counsel. However, as indicated by the colloquy quoted above, the Referee did not attempt to make any such determination, and merely assumed the existence of malice after he had determined that there was a conversion. It is a well settled rule, as evidenced by the law of the state where the trial proceedings were held, that where a party has made a full and fair statement of all the facts bearing on the case of which he has knowledge or which he could have attained by reasonable diligence and inquiry, and has acted honestly and in good faith upon the advice received from counsel, the absence of malice is established. *Sandell v. Sherman,* 107 Cal. 391, 40 Pac. 493 (1895); *Klotz v. Alexander,* 203 Cal. App.2d 238, 21 Cal.Rptr. 305 (1962).

It was undisputed in the proceedings before the Referee in Bankruptcy that Petitioner had acted in good faith upon the advice received from counsel; and that, in addition, he believed at the time he was acting that Respondent United California Bank had sufficient accounts receivable in its possession to satisfy the amount of the indebtedness owing by Petitioner. Under these circumstances, it is hard to conceive that the Referee would have concluded that malice existed if he had attempted to make such a determination. Moreover, as this Honorable Court pointed out in *Davis v. Aetna Acceptance Company, supra,* "there may be an honest, but mistaken, belief, engendered by a course of dealing, that powers have been enlarged or capacities removed. In these and like cases, what is done is a tort, but not a willful and malicious one." (79 L.Ed. at 397). In the case at hand, there was no mistake

arising from a course of dealing, however there was an honest but mistaken belief engendered by the advice of his counsel and by the erroneous belief that Respondent United California Bank had sufficient receivables to cover the amount of the outstanding indebtedness.

III.

Conclusion.

The Honorable Referee in Bankruptcy, in making the determination hereinabove referred to, and the United States District Court for the Central District of California and the Ninth Circuit Court of Appeals, in affirming said Order, have presented this Honorable Court with two important questions involving federal law which are in direct conflict with previous decisions of this Court. If this decision is allowed to stand, then the purpose and intent of the Bankruptcy Act, as clearly enunciated by this Honorable Court, will be severely frustrated. In addition, the failure to make a determination as to the existence of malice, and the assumption that if a conversion exists, it is deemed to be malicious, are in direct defiance of the previous rulings of this Honorable Court. For the reasons set forth hereinabove, Petitioner respectfully submits that this Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Judicial Circuit be granted.

RICHARD R. CLEMENTS,
Attorney for Petitioner
Alden G. Hansen.

VON HERZEN, CATLIN, REINJOHN &
CLEMENTS,
Of Counsel.

APPENDIX "A."

Findings of Fact and Conclusions of Law Upon Application to Determine Dischargeability of Debts Due United California Bank.

United States District Court, Central District of California.

In the Matter of Alden G. Hansen, Bankrupt. No. 89,497.

Filed: Aug. 19, 1971.

At Los Angeles, in said district, this 19th day of August, 1971.

Upon the application of the United California Bank filed herein on May 19, 1971, and upon the answer to said application filed herein by the bankrupt and upon a hearing held before the undersigned Referee in Bankruptcy in his Courtroom on the 5th day of August, 1971, at which time there appeared Jeffrey Chanin of Quittner, Stutman, Treister & Glatt Professional Corporation, counsel for the United California Bank; Sylvan Y. Allen, counsel for the bankrupt and the bankrupt; and upon the testimony of Sylvan Y. Allen, Alden G. Hansen and Robert Sullivan; and upon the documents admitted into evidence at the aforesaid hearing, the Court makes and enters the following Findings of Fact and Conclusions of Law:

1. The United California Bank is a California banking corporation, with its principal place of business in the County of Los Angeles, State of California.

2. On February 7, 1969, the United California Bank and Hibbs Precision Sheet Metal, Inc., a California corporation, entered into an accounts receivable financing arrangement evidenced by a written security agreement dated February 7, 1969.

3. On and prior to February 7, 1969, Alden G. Hansen was President and sole stockholder of Hibbs Precision Sheet Metal, Inc.

4. On or about February 7, 1969, Alden G. Hansen, the bankrupt, executed a continuing guarantee of all obligations due the United California Bank from Hibbs Precision Sheet Metal, Inc.

5. On March 31, 1969, the United California Bank filed a financing statement with the Secretary of State of the State of California with regard to the accounts receivable financing arrangement described hereinabove.

6. Pursuant to the provisions of the Security Agreement executed by the bankrupt and the United California Bank, the United California Bank was granted a security interest in all accounts receivable, contract rights and general intangibles of Hibbs Precision Sheet Metal, Inc., as they existed on February 7, 1969, and such accounts receivable, contract rights and general intangibles as might arise thereafter and all proceeds thereof to secure any and all advances of United California Bank to Hibbs Precision Sheet Metal, Inc.

7. Pursuant to the terms of the security agreement executed by Alden G. Hansen, as President of Hibbs Precision Sheet Metal, Inc., and as guaranteed by Alden G. Hansen in his individual capacity, the aforesaid Alden G. Hansen was required to remit any and all sums received upon accounts receivable of Hibbs Precision Sheet Metal, Inc., to the United California Bank or to preserve and segregate such accounts receivable proceeds for the benefit of said bank.

8. In or about July, 1970, Hibbs Precision Sheet Metal, Inc., was unable to pay its obligations as they matured and was obligated for withholding and payroll taxes to various State and Federal taxing agencies.

9. In July, 1973, and prior thereto, the United California Bank had made advances to Hibbs Precision Sheet Metal, Inc., secured by the accounts receivable, contract rights and general intangibles and the proceeds thereof of Hibbs Precision Sheet Metal, Inc.

10. On or about July 10, 1970, Alden G. Hansen received from various account debtors of Hibbs Precision Sheet Metal, Inc., proceeds of accounts receivable. On or about the above date, Alden G. Hansen, acting upon the advice of his counsel and in concert with Sylvan Y. Allan, caused checks in the total sum of $26,950.94 derived from the accounts receivable of Hibbs Precision Sheet Metal, Inc., to be deposited to a trust account at the Bank of America held in the name of Sylvan Y. Allan, as trustee for Hibbs Precision Sheet Metal, Inc. During the period July 10, 1970 through August 15, 1970 checks were drawn on the above trust account and used for payment of various creditor obligations of Hibbs Precision Sheet Metal, Inc., including rent, payroll, attorneys fees to Sylvan Y. Allan, and other purposes.

11. On or about July 23, 1970 the balance in the aforesaid account was withdrawn and cashiers checks obtained from the Bank of America. The aforesaid cashiers checks were retained in the possession of Alden G. Hansen until September or October of 1970 at which time they were deposited in the Bank of America Sepulveda branch and ultimately disbursed.

12. The United California Bank did not receive any sums from the trust account described hereinabove.

13. On July 15 and July 22, 1970 and thereafter, demand was made upon Alden G. Hansen and Sylvan Y. Allan for remittance of the accounts receivable pro-

ceeds deposited by them to the aforesaid trust account. These demands were rejected.

14. Alden G. Hansen had knowledge of the demand of the United California Bank for the remittance of the accounts receivable proceeds held by the bank as security for its debt and willfully, wantonly and maliciously refused to turn over to the United California Bank the aforesaid accounts receivable proceeds.

15. Alden G. Hansen has intentionally, willfully and maliciously converted the property of the United California Bank, to-wit: accounts receivable proceeds in the sum of $26,950.94 to his own use and benefit.

16. Alden G. Hansen has willfully and maliciously converted the property of the United California Bank to the extent of the aforesaid $26,950.94 and with respect to such conversion is indebted to the United California Bank in the aforesaid sum and such debt is non-dischargeable.

CONCLUSIONS OF LAW

1. Any and all Findings of Fact which may be, in whole or in part, conclusions of law are incorporated by reference herein.

2. Alden G. Hansen has willfully and maliciously converted the property of the United California Bank, to-wit: the sum of $26,950.94.

3. That the conversion set forth hereinabove is not affected by a discharge in bankruptcy pursuant to §17a(2) of the Bankruptcy Act [11 U.S.C. §35a(2)].

4. Pursuant to the provisions of §17c(3) of the Bankruptcy Act, the Bankruptcy Court has jurisdiction to determine the dischargeability of the debt involved in this proceeding and to render judgment in favor of the prevailing party.

5. The Court concludes that the United California Bank is entitled to a judgment against Alden G. Hansen in the sum of $26,950.94, plus interest at the legal rate of 7% from the date of judgment until paid and that such judgment be entered by the Court and declared to be not discharged by any discharge in bankruptcy which may be granted Alden G. Hansen in this bankruptcy proceeding.

/s/ Ray H. Kinnison
REFEREE IN BANKRUPTCY

Judgment.

United States District Court, Central District of California.

In the Matter of Alden G. Hansen, Bankrupt. No. 89,497.

Filed: August 19, 1971.

AT LOS ANGELES, IN SAID DISTRICT, THIS 19th DAY OF AUGUST, 1971.

Upon the application of the United California Bank filed herein on May 19, 1971, and upon the answer to said application filed herein by the bankrupt and upon a hearing held before the undersigned Referee in Bankruptcy in his Courtroom on the 5th day of August, 1971, at which time there appeared Jeffrey Chanin of Quittner, Stutman, Treister & Glatt Professional Corporation, counsel for the United California Bank; Sylvan Y. Allan, counsel for the bankrupt and the bankrupt; and upon the testimony of Sylvan Y. Allen, Alden G. Hansen and Robert Sullivan; and upon the documents admitted into evidence at the aforesaid hearing, and upon the Findings of Fact and Conclusions of law entered herein and good cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED, that the United California Bank, a California banking corporation, have judgment against Alden G. Hansen in the sum of $26,950.94, plus interest from the date of Judgment until paid at the legal rate of 7% per annum; and it is further

ORDERED, ADJUDGED AND DECREED, that the Judgment rendered herein is not dischargeable in bankruptcy and has not been discharged by reason of any discharge in bankruptcy heretofore or hereafter granted to Alden G. Hansen in these bankruptcy proceedings.

/s/ Ray H. Kinnison
REFEREE IN BANKRUPTCY

APPENDIX "B."

Order Upon Petition for Review.

United States District Court, Central District of California.

In the Matter of Alden G. Hansen, Bankrupt. No. 89497.

Filed: March 6, 1972.

AT LOS ANGELES, IN SAID DISTRICT, THIS 6th DAY OF MARCH, 1972.

Upon the Petition for Review filed herein by Alden G. Hansen, bankrupt, petitioning for a review of an Order of the Honorable Ray H. Kinnison, Referee in Bankruptcy, and upon the Referee's Certificate on Petition for Review, the Memoranda of Points & Authorities filed herein by the petitioner and the respondent, and upon the oral argument of counsel at a hearing before the undersigned United States District Judge, held on the 24th day of February, 1972, at the hour of 11:00 a.m., in Room 231 United States Courthouse, Temple and Spring Streets, Los Angeles, California, and upon the record of the proceedings in controversy as transmitted and good cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED that the judgment entered by the Honorable Ray H. Kinnison, Referee in Bankruptcy on April 19, 1971, be and it hereby is affirmed.

DATED: March 6, 1972.

/s/ Harry C. Westover
HARRY C. WESTOVER
UNITED STATES SENIOR DISTRICT JUDGE

APPENDIX "C."

United States Court of Appeals, for the Ninth Circuit.

In the Matter of Alden G. Hansen, Bankrupt. Alden G. Hansen, Petitioner-Appellant, v. United California Bank, Respondent-Appellee. No. 72-1682.

Filed: February 28, 1973.

Appeal from the United States District Court for the Central District of California.

Before: CHAMBERS, BROWNING, and DUNIWAY, Circuit Judges PER CURIAM:

We cannot say the finding that the conversion here was "wilful or malicious," as required by section 17 (a)(2) of the Bankruptcy Act, 11 U.S.C. § 35(a)(2), rather than merely "innocent or technical," *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934), was clearly erroneous. Testimony before the referee indicated that appellant, with the aid of his attorney, converted the creditor's property intentionally and without justification or excuse.

The order of the district court affirming the order of the referee in bankruptcy awarding a money judgment against appellant and declaring the debt nondischargeable under section 17(a)(2) is therefore affirmed.

NOT PUBLISHED

APPENDIX "D."

Order.

United States Court of Appeals, for the Ninth Circuit.

In the Matter of Alden G. Hansen, Bankrupt. Alden G. Hansen, Petitioner-Appellant, v. United California Bank, Respondent-Appellee. No. 72-1682.

Filed: April 16, 1973.

Before: CHAMBERS, BROWNING, and DUNIWAY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The contention that the referee incorrectly equated "conversion" with "willfulness" or "maliciousness" was brought to the referee's attention in appellant's unsuccessful petition for reconsideration before that referee. It is sufficiently rebutted by the referee's finding of fact #14—a finding of willfulness and maliciousness that does not rest on mere conversion per se.

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Dated: April 16, 1973.

Supreme Court of the United States

October Term, 1973
No. 73-108

ALDEN G. HANSEN,

Petitioner,

vs.

UNITED CALIFORNIA BANK,

Respondent.

In the Matter of ALDEN G. HANSEN,

Bankrupt.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-106

ALDEN G. HANSEN,

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UNITED CALIFORNIA BANK,

Respondent.

In the Matter of ALDEN G. HANSEN,

Bankrupt.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION.

Opinions Below.

The judgment and findings of the Referee in Bankruptcy are unreported but appear at pages 14-20 of the Record. (All citations to the "Record" refer to the Record on Appeal in the Court of Appeals.) The District Court for the Central District of California on petition for review affirmed the judgment of the Referee in Bankruptcy; its order is found at page 53 of the Record. The opinion of the Court of Appeals for the Ninth Circuit is unreported but is found as Appendix C to the Petition for Writ of Certiorari herein. The or-

der of the Court of Appeals for the Ninth Circuit denying Petition for Reconsideration and/or Rehearing is similarly unreported and is found as Appendix D to the Petition for Writ of Certiorari herein.

Jurisdiction.

The basis for this Court's jurisdiction is set forth in the Petition for Writ of Certiorari herein.

Question Presented.

Whether the courts below clearly erred in determining that respondent's claim against petitioner is based upon a willful and malicious conversion of property, and is thus nondischargeable in bankruptcy.

Statutory Provision Involved.

Bankruptcy Act, Section 17a(2) [11 U.S.C. §35a (2)]:

> "(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (2) are liabilities . . . for willful and malicious conversion of the property of another. . . ."

Statement.

In February 1969 respondent United California Bank entered into an accounts receivable financing agreement with Hibbs Precision Sheet Metal, Inc. (hereinafter referred to as "Hibbs") under which respondent obtained a security interest in all the Hibbs accounts receivable and proceeds thereof. Petitioner, the president and sole shareholder of Hibbs, personally guaranteed the corporation's obligation.

Despite the contract provision that all collections of receivables would be held in trust for respondent, petitioner in July 1970 diverted a total of $26,950.94 of Hibbs' customer checks into his attorney Sylvan Y. Allen's trust account. All of the funds from this trust account were subsequently disbursed to labor claimants, tax claimants and other creditors of Hibbs at the direction of petitioner, except that two checks in the respective amounts of $6,854.96 and $2,102.54 were made payable to Hibbs and delivered to petitioner. He held them in his possession for over a month before returning the money to the Hibbs bank account from which it was again used for purposes other than paying respondent. Prior to the distribution of any funds from the trust account, both Allen and petitioner had specific knowledge of respondent's claim to the money, but the demands by respondent for remittance of the accounts receivable proceeds were ignored.

On April 7, 1971, voluntary petitions in bankruptcy were filed for Hibbs and petitioner. On May 19, 1971, respondent filed in petitioner's bankruptcy proceeding an application under §17c(2) of the Bankruptcy Act [11 U.S.C. §35c(2)], to obtain a determination that its claim against petitioner to the extent of $26,950.94 was nondischargeable as a debt arising from a willful and malicious conversion of property. Bankruptcy Act §17a(2) [11 U.S.C. §35a(2)]. On August 19, 1971, after a full hearing, the Referee in Bankruptcy determined respondent's claim to be nondischargeable and entered judgment for respondent in

the amount of $26,950.94. On March 6, 1972, the District Court, on petitioner's review, affirmed the judgment of the Referee in Bankruptcy. Notice of Appeal to the Ninth Circuit was filed March 16, 1972, and the Court of Appeals affirmed the District Court on February 28, 1973. Petitioner's Petition for Reconsideration and/or Rehearing was denied by the Court of Appeals on April 16, 1973. The Petition for Writ of Certiorari was filed on July 12. 1973.

ARGUMENT.

There Is No Important Federal Question Involved in This Case. The Courts Below Merely Found the Facts Against Petitioner, and Then Properly Applied Long Established Legal Principles in Harmony With Decisions of This Court.

There is no merit to petitioner's contention that the holding below is inconsistent with this Court's decision in *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934). In that case, a bankrupt's mere technical conversion of a secured party's collateral was held not willful and malicious for dischargeability purposes. The present case, however, factually involves actual willfulness and malice in the conversion of respondent's security, not simple conversion *per se*.

The findings below are:

> "Alden G. Hansen [petitioner] had knowledge of the demand of the United California Bank for the remittance of the accounts receivable proceeds held by the bank as security for its debt and willfully, wantonly and maliciously refused to turn over to the United California Bank the aforesaid accounts receivable proceeds.
>
> "Alden G. Hansen has intentionally, willfully and maliciously converted the property of the United California Bank, to-wit: accounts receivable proceeds in the sum of $26,950.94 to his own use and benefit."
>
> [Petition for Writ of Certiorari, Appendix A, Findings of Fact 14 and 15, p. 4].

Thus, this case is like *McIntyre v. Kavanaugh*, 242 U.S. 138 (1916), where the Court held the conversion

claim nondischargeable. *McIntyre* was expressly approved by this Court in its *Davis* decision upon which petitioner relies:

> "There is no doubt that an act of conversion if willful and malicious, is an injury to property within the scope of this exception. Such a case was *McIntyre v. Kavanaugh* [citation omitted] where the wrong was unexcused and wanton." 293 U.S. 332.

Essentially, petitioner attacks the findings of fact with respect to the issue of willfulness and malice. But these findings cannot be overturned as clearly erroneous [*Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949); *Pick Mfg. Co. v. General Motors*, 299 U.S. 3 (1936)]; indeed, they are not erroneous at all. As the record indicates, petitioner set out knowingly and purposefully to divert accounts receivable collections so as to deprive respondent of its rights in the collateral. Petitioner was aware of the existence of a security interest in favor of respondent United California Bank [RT p. 58, lines 16-21].* Upon being advised of the Bank's refusal of additional credit, he concealed from the Bank previously assigned accounts receivable proceeds [RT p. 87, line 21 to p. 88, line 24]. Petitioner was advised in advance and was aware that his actions in converting the Bank's property could constitute a nondischargeable debt [RT p. 19, lines 7-13]. He admitted concealing the Bank's property long after demand for such property had been made upon him [RT p. 93, line 9 to p. 94, line 21]. Peti-

*All references to the Reporter's Transcript are abbreviated with the letters "RT" and refer to the Reporter's Transcript of the proceedings had before the Referee in Bankruptcy on August 5, 1971, unless otherwise indicated.

tioner, acting in concert with Allen, with the admitted intent to hinder the efforts of creditors to enforce their rights [RT p. 65, lines 10-13], transferred and concealed assets belonging to respondent in an undisclosed trust account [RT p. 87, line 21 to p. 88, line 13; p. 89, lines 18-22].

Petitioner's belated attempt in the Court of Appeals to excuse his conduct by asserting that he acted on the incompetent advice of his counsel, Allen, is not persuasive [Opening Brief on Appeal, p. 14; *See* also, *Petition for Writ of Certiorari,* pp. 14-15]. Petitioner is a sophisticated, well-educated businessman [RT p. 57, lines 14-23] who was advised by other counsel as to the probable consequences of his acts and chose to disregard such advice [RT Exs. 6 and 8]. In addition, the record shows that Allen was not merely petitioner's counsel, but rather was an active participant in the scheme to convert respondent's collateral. Under such circumstances, purported reliance on counsel is no defense.

Conclusion.

For each and all of the foregoing reasons, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE M. TREISTER,
Attorney for Respondent.

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